BRINGING AMERICANS WITH DISABILITIES INTO THE WORKFORCE

Introduction

In an era of increasing global competition and a decreasing workforce, America's survival depends on full utilization of those who are willing and able to work. The Americans with Disabilities Act (ADA) is an example of recent legislation which, in addition to not meeting its owns stated goals for workers, has had unintended consequences for the nation's employers.

The ADA's employment provisions prohibit employers from discriminating on the basis of disability in their hiring practices, promotion practices, and employee benefits practices. A person has a disability for purposes of the ADA if he or she has a physical or mental impairment that substantially limits one or more major life activities.[1] So long as a person with a disability is otherwise qualified and able to perform the essential functions of the job,[2] an employer must provide reasonable accommodation of the disability.[3] Accommodation is reasonable if it does not cause the employer an undue hardship.[4] The ADA's employment provisions are enforced by the Equal Employment Opportunity Commission (EEOC) and by private legal action.

The American Worker Project conducted the first inquiries into the status of this legislation by the Committee on Education and the Workforce. Chairman Hoekstra held a Roundtable meeting on disability issues on January 28, 1998, in Roswell, Georgia, followed by a meeting of 21 opinion leaders in the Rayburn House Office Building in Washington, D.C. on October 5, 1998. A list of attendees for the October 5, 1998, meeting is attached as Appendix 7.

Removing Work Disincentives from Disability Policy

While the ADA sets a primary goal of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency,"[5] studies done thus far have not shown a significant percentage of Americans with disabilities entering the workforce since the law became effective. The recent survey by Louis Harris & Associates, commissioned by the National Organization on Disability (NOD), found that 71 percent of persons with disabilities of working age (18 to 64) are not employed, versus 21 percent of Americans without disabilities, a gap of 50 percentage points. The recent survey also found that 72 percent of those who are not employed would prefer to be working. In 1986, when Harris first conducted this poll, 66 percent of people with disabilities were not employed, as opposed to less than 10 percent of all Americans. In 1994, Harris reported that 67 percent of people with disabilities were not employed, versus 10 percent of all Americans.[6]

Many of the advocates who attended the October 5, 1998, meeting believe these disappointing early statistics are best explained in terms of the disincentives to employment posed by other programs that make up the broader disability policy in America. The largest of these is the social security disability insurance (SSDI) program, which provides benefits to individuals covered under the social security program who are no longer able to work. The other

major government program is supplementary security income (SSI) for individuals with disabilities who were not eligible for SSDI. Participation in either SSDI or SSI generally confers coverage by Medicare or Medicaid, and thus provides health care benefits to people with disabilities participating in either program.

Under current law, SSDI/SSI participants wanting to join the workforce and become employed must give up their SSDI/SSI benefits, and their health care coverage as well. But, the new employers of former SSDI/SSI participants may offer no health care insurance or offer insurance that is not sufficient for their needs. Thus the traditional disability benefit and health insurance system, based as it is on a model of charity and dependency, provides major barriers to employment that are at odds with the ADA's goal of ensuring equal employment opportunity to people with disabilities. These "charitable" policies have created what one meeting participant called a "black hole of dependency" from which few people with disabilities ever emerge.

Some Trends in the Law that May Not Reflect Congressional Intent

Some who attended the October 5, 1998, meeting believe the NOD's findings can be blamed, at least in part, on employer uncertainty over the rapidly developing ADA case law. As with any new legislation, the agencies and the courts are attempting to define the parameters of this far-reaching statute. Though the ADA is in its legal infancy, the American Worker Project does recommend that Congress pay attention to developments in at least three areas.

Definition of Disability

EEOC and some courts have attempted to expand the definition of disability to include temporary and non-chronic impairments. The EEOC Compliance Manual states that impairment lasting at least several months is not short term and temporary and may be disabling.[7] In *Aldrich v. Boeing Co.*,[8] the U.S. Court of Appeals for the Tenth Circuit refused to adopt a *per se* rule that an impairment is not a disability unless it is rendered permanent by a doctor's rating or permanent restrictions. In *Katz v. City Metal Co.*,[9] the First Circuit Court of Appeals said that although short-term, temporary restrictions generally are not substantially limiting, an impairment does not necessarily have to be permanent to rise to the level of a disability.

The EEOC and the courts continue to expand the list of "major life activities" which may be considered in determining whether an individual is disabled by reason of a substantial limitation in such activities.[10] Most recently, the U.S. Supreme Court stated in *Bragdon v. Abbott* [11] that reproduction is a major life activity under the ADA (leading to the possibility that men who take Viagra have a disability for purposes of the ADA). As another example, the EEOC had taken the position that sleeping is a major life activity, although one court has noted to the contrary.[12]

Reasonable Accommodation

The requirement to provide a reasonable accommodation has resulted in much litigation over the nature and extent of this obligation.

The Civil Rights Act of 1991 limits damages for an employer who has made a good faith effort at providing a reasonable accommodation in consultation with the person with a disability.[13] Some courts, however, have decided that employers have no liability at all under the ADA when good faith efforts at providing accommodation have been made. For example, the Court of Appeals for the Sixth Circuit, in *Cassidy v. Detroit Edison Co.*,[14] determined that where an employee did not identify precise limitations and potential reasonable accommodation but the employer still attempted to accommodate her breathing problems, the employer had done all it could to reasonably accommodate. And, in *Stewart v. Happy Herman's Cheshire Bridge*, [15] the Eleventh Circuit Court of Appeals said: "Liability simply cannot arise under the ADA when an employer does not obstruct an informal interactive process; makes reasonable efforts to communicate with the employee and provide accommodations based on the information it possesses; and the employee's actions cause a breakdown in the interactive process."[16]

Although the EEOC has asserted the modifier "reasonable" only means effective, many courts have said instead that reasonable implies a limitation.[17] The Court of Appeals for the First Circuit has said that the likelihood of success of accommodation is just one element of whether it is reasonable.[18] In *Willis v. Conopco, Inc.*,[19] the Eleventh Circuit said: "As a general matter, a reasonable accommodation is one employing a method of accommodation that is reasonable in the run of cases, whereas the undue hardship inquiry focuses on the hardships imposed by the plaintiff's preferred accommodation in the context of the particular agency's operations." The Second and the Sixth Circuits have applied a similar cost benefit analysis to determine reasonableness, including analysis of accommodations provided by other employers.[20] The Fourth Circuit has recognized that the concept that an accommodation be reasonable is clearly meant to avoid placing employers in an untenable position.[21] The Seventh Circuit has said that reasonable accommodation and undue hardship both require a cost benefit analysis; an accommodation is not reasonable if it does not permit an employee to perform all essential job functions or its cost is disproportionate to its benefit.[22]

Although regular and reliable attendance is a requirement for most jobs, a number of federal appellate courts have recently determined that employers who provided employees four months, five months, even one year of leave had not adequately accommodated employees under the ADA. For example, in *Ralph v. Lucent Technology, Inc.*,[23] the Court of Appeals for the First Circuit ruled an employee who had been on disability leave for 52 weeks was entitled to an additional 4-6 weeks of part-time work as an accommodation to enable him to gradually resume working. In *Criado v. IBM Corp.*,[24] the First Circuit found a potential ADA violation when IBM refused to extend leave as an accommodation. Furthermore, in *Cehrs v. Northeast Ohio Alzheimer's Research Center*[25] the U. S. Court of Appeals for the Sixth Circuit recently noted the FMLA's 12-week leave entitlement forms the floor -- along with any greater leave benefits provided by the company -- on top of which ADA accommodation leave may be stacked.

Several Circuit Courts of Appeals have said that reasonable accommodation under the ADA can include reassignment to a vacant position. Reasonable accommodation in the form of job reassignment was recently elevated to a new level by the Court of Appeals for the District of Columbia Circuit. Sitting in full, the court ruled, in *Aka v. Washington Hospital Center*,[26] that the employer may have violated the ADA rights of a 20-year employee who was not reassigned to a new position on a noncompetitive basis. In other words, the court said it is not enough to ask an employee who cannot do his original job to apply for posted vacancies. Rather, under the ADA's requirement of reasonable accommodation, an employer who cannot accommodate an employee in the original job must affirmatively search for another job within the company that the employee can do. If such a job is identified, the employer must then place the employee in the position as long as he or she is minimally qualified even if there may be more qualified applicants also seeking the job. Congress may want to consider the extent to which leave and reassignment were intended to be accommodations within the meaning of the ADA.

Safety Issues

The ADA recognizes the employer defense that the individual would pose a "direct threat" to the health or safety of others in the workplace.[27] EEOC regulations say that to establish this defense, an employer must show that there is a high probability that imminent substantial harm will occur which cannot be reduced by a reasonable accommodation,[28] a standard that the Supreme Court essentially endorsed in *Bragdon v. Abbott*, supra.

Findings and Recommendations

- American Worker Project believes that existing legislative barriers to employment should be removed, and that, in doing so, Congress should consider a Medicaid buy-in that would allow working people with disabilities to continue receiving Medicaid benefits at rates determined by their earnings.

- Congress should consider clarifying the provisions of the ADA itself.

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[1] 42 U.S.C.A. § 12101(2).
[2] 42 U.S.C.A. §§ 12111(8) and 12112 (b) (5).
[3] 42 U.S.C.A. §§ 12111(9) and 12112 (b) (5).
[4] 42 U.S.C.A. § 12111(10). Much of what the ADA legislates concerning disability and non-discriminatory practices is identical to Section 504 of the Rehabilitation Act of 1973, 29 USCA §§ 701-796.
[5] 42 U.S.C.A. § 12101(8).
[6] Louis Harris & Associates, 1998 National Organization on Disability, A SURVEY OF AMERICANS WITH DISABILITIES, Washington, D.C., July 23, 1998.
[7] § 902.4(d) at p. 30.
[8] Aldrich v. Boeing, 146 F.3d 1265 (10th Cir. 1998).
[9] Katz v. City Medal Co., 87 F.3d 26 (1st Cir. 1996).
[10] *See eg*. EEOC Enforcement Guidelines on the Americans with Disabilities Act and Psychiatric Disabilities, Notice No. 915.002, 6-7 (March 25, 1997).
[11] 118 S.Ct. 2196 (1998).

[12] *See* Sarko v. Penn-Del Directory Co., 956 F. Supp. 1026 (E.D. Pa. 1997) (getting sound night's sleep and reporting to work on time with clear mind not major life activity).
[13] 42 U.S.C.A. § 1981(a)(3).
[14] Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998).
[15] Stewart v. Happy Herman's Cheshire Bridge, 117 F.3d 1278, 1287 (11th Cir. 1997).
[16] See also Riley v. Weyerhauser Paper Co., 77 F.3d 470 (4th Cir. 1996) (no liability for failure to provide reasonable accommodation where employer had discussions with plaintiff, prepared job description and videotape of job to show employee's physician and where employee contacted the Job Accommodation Network).
[17] 29 C.F.R. § 1630.9 App.
[18] Evans v. Federal Express Corp., 133 F. 3d 137 (1st Cir. 1998).
[19] Willis v. Conopoc, Inc., 108 F.3d 282, 286, FN 2 (11th Cir. 1997).
[20] Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir. 1995); Monette v. Electronic Data Systems, 90 F.3d 1173 (6th Cir. 1996).
[21] Myers v. Hose, 50 F.3d 278 (4th Cir. 1995).
[22] VandeZande v. Wisconsin Dept. of Admin., 44 F.3d 538 (7th Cir. 1995). See also Bryant v. Better Business Bureau of Maryland, 923 F. Supp. 720 (D. Md. 1996) (in determining whether accommodation is reasonable, it must be effective and would allow employee to attain an equal level of achievement, opportunity and participation).
[23] Ralph v. Lucent Technology, 135 F.3d 166 (1st Cir. 1998).
[24] Criado v. IBM Corp.,145 F.3d 437 (1st Cir. 1998).
[25] Cehrs v. Northeast Ohio Alzheimer's Research Center, F.3d ,1998 WL 548837 (6th Cir. 1998).
[26] Aka v. Washington Hospital Center, F.3d ,1998 WL 698396 (D.C.Cir.1998).
[27] 42 U.S.C.A. § 12113(b).
[28] 29 C.F.R. § 1630.2(r) & App.